

**ASSEMBLY BILL**

**No. 447**

---

**Introduced by Assembly Member Nestande**

February 24, 2009

---

An act to amend Sections 987, 987.4, 987.8, and 987.81 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 447, as introduced, Nestande. Criminal procedure: trial counsel: defendant: inability to pay.

Existing law requires a court to assign counsel to a defendant if the defendant desires the assistance of counsel and cannot afford to pay for counsel. Under existing law, the court is authorized to require a person requesting counsel to fill out a form, under penalty of perjury, or hold a hearing at various points in the criminal proceeding to determine whether the defendant has the ability to pay for assigned counsel, as specified.

This bill would, instead, require the court to have the person fill out the form. This bill would also require the court to hold a hearing to determine whether a defendant has the ability to pay for assigned counsel, as specified.

Because this bill would expand the application of a crime, it would impose a state-mandated local program.

Existing law authorizes a court to order the parent or guardian of a minor in a criminal proceeding to pay for any public representation to the extent that the court determines that the parent or guardian can pay that expense.

This bill would require the court to order that payment to the extent the parent or guardian can pay for it.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 987 of the Penal Code is amended to  
2 read:

3 987. (a) In a noncapital case, if the defendant appears for  
4 arraignment without counsel, he or she shall be informed by the  
5 court that it is his or her right to have counsel before being  
6 arraigned, and shall be asked if he or she desires the assistance of  
7 counsel. If he or she desires and is unable to employ counsel the  
8 court shall assign counsel to defend him or her.

9 (b) In a capital case, if the defendant appears for arraignment  
10 without counsel, the court shall inform him or her that he or she  
11 shall be represented by counsel at all stages of the preliminary and  
12 trial proceedings and that the representation is at his or her expense  
13 if he or she is able to employ counsel or at public expense if he or  
14 she is unable to employ counsel, inquire of him or her whether he  
15 or she is able to employ counsel and, if so, whether he or she  
16 desires to employ counsel of his or her choice or to have counsel  
17 assigned, and allow him or her a reasonable time to send for his  
18 or her chosen or assigned counsel. If the defendant is unable to  
19 employ counsel, the court shall assign counsel to defend him or  
20 her. If the defendant is able to employ counsel and either refuses  
21 to employ counsel or appears without counsel after having had a  
22 reasonable time to employ counsel, the court shall assign counsel.

23 The court shall at the first opportunity inform the defendant's  
24 trial counsel, whether retained by the defendant or court-appointed,  
25 of the additional duties imposed upon trial counsel in any capital  
26 case as set forth in paragraph (1) of subdivision (b) of Section  
27 1240.1.

28 (c) In order to assist the court in determining whether a  
29 defendant is able to employ counsel in any case, the court ~~may~~  
30 *shall* require a defendant to file a financial statement or other

1 financial information under penalty of perjury with the court or,  
2 in its discretion, order a defendant to appear before a county officer  
3 designated by the court to make an inquiry into the ability of the  
4 defendant to employ his or her own counsel. If a county officer is  
5 designated, the county officer shall provide to the court a written  
6 recommendation and the reason or reasons in support of the  
7 recommendation. The determination by the court shall be made  
8 on the record. Except as provided in Section 1214, the financial  
9 statement or other financial information obtained from the  
10 defendant shall be confidential and privileged and shall not be  
11 admissible in evidence in any criminal proceeding except the  
12 prosecution of an alleged offense of perjury based upon false  
13 material contained in the financial statement. The financial  
14 statement shall be made available to the prosecution only for  
15 purposes of investigation of an alleged offense of perjury based  
16 upon false material contained in the financial statement at the  
17 conclusion of the proceedings for which the financial statement  
18 was required to be submitted. The financial statement and other  
19 financial information obtained from the defendant shall not be  
20 confidential and privileged in a proceeding under Section 987.8.

21 (d) In a capital case, the court may appoint an additional attorney  
22 as a cocounsel upon a written request of the first attorney  
23 appointed. The request shall be supported by an affidavit of the  
24 first attorney setting forth in detail the reasons why a second  
25 attorney should be appointed. Any affidavit filed with the court  
26 shall be confidential and privileged. The court shall appoint a  
27 second attorney when it is convinced by the reasons stated in the  
28 affidavit that the appointment is necessary to provide the defendant  
29 with effective representation. If the request is denied, the court  
30 shall state on the record its reasons for denial of the request.

31 (e) This section shall become operative on January 1, 2000.

32 SEC. 2. Section 987.4 of the Penal Code is amended to read:

33 987.4. When the public defender or an assigned counsel  
34 represents a person who is a minor in a criminal proceeding, at the  
35 expense of a county, the court ~~may~~ *shall* order the parent or  
36 guardian of ~~such~~ *the* minor to reimburse the county for all or any  
37 part of ~~such~~ *that* expense, if it determines that the parent or  
38 guardian has the ability to pay ~~such~~ *that* expense.

39 SEC. 3. Section 987.8 of the Penal Code is amended to read:

1 987.8. (a) Upon a finding by the court that a defendant is  
2 entitled to counsel but is unable to employ counsel, the court ~~may~~  
3 *shall* hold a hearing or, in its discretion, order the defendant to  
4 appear before a county officer designated by the court, to determine  
5 whether the defendant owns or has an interest in any real property  
6 or other assets subject to attachment and not otherwise exempt by  
7 law. The court may impose a lien on any real property owned by  
8 the defendant, or in which the defendant has an interest to the  
9 extent permitted by law. The lien shall contain a legal description  
10 of the property, shall be recorded with the county recorder in the  
11 county or counties in which the property is located, and shall have  
12 priority over subsequently recorded liens or encumbrances. The  
13 county shall have the right to enforce its lien for the payment of  
14 providing legal assistance to an indigent defendant in the same  
15 manner as other lienholders by way of attachment, except that a  
16 county shall not enforce its lien on a defendant's principal place  
17 of residence pursuant to a writ of execution. No lien shall be  
18 effective as against a bona fide purchaser without notice of the  
19 lien.

20 (b) In any case in which a defendant is provided legal assistance,  
21 either through the public defender or private counsel appointed by  
22 the court, upon conclusion of the criminal proceedings in the trial  
23 court, or upon the withdrawal of the public defender or appointed  
24 private counsel, the court ~~may~~ *shall*, after notice and a hearing,  
25 make a determination of the present ability of the defendant to pay  
26 all or a portion of the cost thereof. The court may, in its discretion,  
27 hold one ~~such~~ additional hearing within six months of the  
28 conclusion of the criminal proceedings. The court may, in its  
29 discretion, order the defendant to appear before a county officer  
30 designated by the court to make an inquiry into the ability of the  
31 defendant to pay all or a portion of the legal assistance provided.

32 (c) In any case in which the defendant hires counsel replacing  
33 a publicly provided attorney; in which the public defender or  
34 appointed counsel was required by the court to proceed with the  
35 case after a determination by the public defender that the defendant  
36 is not indigent; or, in which the defendant, at the conclusion of the  
37 case, appears to have sufficient assets to repay, without undue  
38 hardship, all or a portion of the cost of the legal assistance provided  
39 to him or her, by monthly installments or otherwise; the court shall  
40 make a determination of the defendant's ability to pay as provided

1 in subdivision (b), and may, in its discretion, make other orders  
2 as provided in that subdivision.

3 This subdivision shall be operative in a county only upon the  
4 adoption of a resolution by the board of supervisors to that effect.

5 (d) If the defendant, after having been ordered to appear before  
6 a county officer, has been given proper notice and fails to appear  
7 before a county officer within 20 working days, the county officer  
8 shall recommend to the court that the full cost of the legal  
9 assistance shall be ordered to be paid by the defendant. The notice  
10 to the defendant shall contain all of the following:

11 (1) A statement of the cost of the legal assistance provided to  
12 the defendant as determined by the court.

13 (2) The defendant's procedural rights under this section.

14 (3) The time limit within which the defendant's response is  
15 required.

16 (4) A warning that if the defendant fails to appear before the  
17 designated officer, the officer will recommend that the court order  
18 the defendant to pay the full cost of the legal assistance provided  
19 to him or her.

20 (e) At a hearing, the defendant shall be entitled to, but shall not  
21 be limited to, all of the following rights:

22 (1) The right to be heard in person.

23 (2) The right to present witnesses and other documentary  
24 evidence.

25 (3) The right to confront and cross-examine adverse witnesses.

26 (4) The right to have the evidence against him or her disclosed  
27 to him or her.

28 (5) The right to a written statement of the findings of the court.

29 If the court determines that the defendant has the present ability  
30 to pay all or a part of the cost, the court shall set the amount to be  
31 reimbursed and order the defendant to pay the sum to the county  
32 in the manner in which the court believes reasonable and  
33 compatible with the defendant's financial ability. Failure of a  
34 defendant who is not in custody to appear after due notice is a  
35 sufficient basis for an order directing the defendant to pay the full  
36 cost of the legal assistance determined by the court. The order to  
37 pay all or a part of the costs may be enforced in the manner  
38 provided for enforcement of money judgments generally but may  
39 not be enforced by contempt.

1 Any order entered under this subdivision is subject to relief under  
2 Section 473 of the Code of Civil Procedure.

3 (f) Prior to the furnishing of counsel or legal assistance by the  
4 court, the court shall give notice to the defendant that the court  
5 ~~may~~ *shall*, after a hearing, make a determination of the present  
6 ability of the defendant to pay all or a portion of the cost of counsel.  
7 The court shall also give notice that, if the court determines that  
8 the defendant has the present ability, the court shall order him or  
9 her to pay all or a part of the cost. The notice shall inform the  
10 defendant that the order shall have the same force and effect as a  
11 judgment in a civil action and shall be subject to enforcement  
12 against the property of the defendant in the same manner as any  
13 other money judgment.

14 (g) As used in this section:

15 (1) “Legal assistance” means legal counsel and supportive  
16 services including, but not limited to, medical and psychiatric  
17 examinations, investigative services, expert testimony, or any other  
18 form of services provided to assist the defendant in the preparation  
19 and presentation of the defendant’s case.

20 (2) “Ability to pay” means the overall capability of the defendant  
21 to reimburse the costs, or a portion of the costs, of the legal  
22 assistance provided to him or her, and shall include, but not be  
23 limited to, all of the following:

24 (A) The defendant’s present financial position.

25 (B) The defendant’s reasonably discernible future financial  
26 position. In no event shall the court consider a period of more than  
27 six months from the date of the hearing for purposes of determining  
28 the defendant’s reasonably discernible future financial position.  
29 Unless the court finds unusual circumstances, a defendant  
30 sentenced to state prison shall be determined not to have a  
31 reasonably discernible future financial ability to reimburse the  
32 costs of his or her defense.

33 (C) The likelihood that the defendant shall be able to obtain  
34 employment within a six-month period from the date of the hearing.

35 (D) Any other factor or factors which may bear upon the  
36 defendant’s financial capability to reimburse the county for the  
37 costs of the legal assistance provided to the defendant.

38 (h) At any time during the pendency of the judgment rendered  
39 according to the terms of this section, a defendant against whom  
40 a judgment has been rendered may petition the rendering court to

1 modify or vacate its previous judgment on the grounds of a change  
2 in circumstances with regard to the defendant's ability to pay the  
3 judgment. The court shall advise the defendant of this right at the  
4 time it renders the judgment.

5 (i) This section shall apply to all proceedings, including  
6 contempt proceedings, in which the party is represented by a public  
7 defender or appointed counsel.

8 SEC. 4. Section 987.81 of the Penal Code is amended to read:

9 987.81. (a) In any case in which a defendant is provided legal  
10 assistance, either through the public defender or private counsel  
11 appointed by the court, upon conclusion of the criminal proceedings  
12 in the trial court, or upon the withdrawal of the public defender or  
13 appointed private counsel, the court shall consider the available  
14 information concerning the defendant's ability to pay the costs of  
15 legal assistance and ~~may~~ *shall*, after notice, as provided in  
16 subdivision (b), hold a hearing to make a determination of the  
17 present ability of the defendant to pay all or a portion of the cost  
18 thereof. ~~Notwithstanding the above, in~~ *In* any case where the court  
19 has ordered the probation officer to investigate and report to the  
20 court pursuant to subdivision (b) of Section 1203, the court ~~may~~  
21 *shall* hold such a hearing. The court may, in its discretion, hold  
22 one ~~such~~ additional hearing within six months of the conclusion  
23 of the criminal proceedings.

24 (b) Concurrent with the furnishing of counsel or legal assistance  
25 by the court, the court shall order the defendant to appear before  
26 a county officer designated by the court to make an inquiry into  
27 the ability of the defendant to pay all or a portion of the legal  
28 assistance provided. Prior to the furnishing of counsel or legal  
29 assistance by the court, the court shall give notice to the defendant  
30 that the court shall, after a hearing, make a determination of the  
31 present ability of the defendant to pay all or a portion of the cost  
32 of counsel. The court shall also give notice that, if the court  
33 determines that the defendant has the present ability, the court  
34 shall order him or her to pay all or a part of the cost. The notice  
35 shall inform the defendant that the order shall have the same force  
36 and effect as a judgment in a civil action and shall be subject to  
37 enforcement against the property of the defendant in the same  
38 manner as any other money judgment.

1 (c) The provisions of this section shall apply only in a county  
2 in which the board of supervisors adopts a resolution which elects  
3 to proceed under this section.

4 SEC. 5. No reimbursement is required by this act pursuant to  
5 Section 6 of Article XIII B of the California Constitution because  
6 the only costs that may be incurred by a local agency or school  
7 district will be incurred because this act creates a new crime or  
8 infraction, eliminates a crime or infraction, or changes the penalty  
9 for a crime or infraction, within the meaning of Section 17556 of  
10 the Government Code, or changes the definition of a crime within  
11 the meaning of Section 6 of Article XIII B of the California  
12 Constitution.